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8 *and Winery Rehabilitation, LLC*

9 **UNITED STATES BANKRUPTCY COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SANTA ROSA DIVISION**

12 In re

13 SVP,

14 Debtor.

Case No. 17-10067-RLE

CHAPTER 11

15 **SECURED CREDITORS' RESPONSE TO**
16 **TRUSTEE'S OBJECTION TO CLAIMS OF**
17 **STEPHEN A. FINN AND WINERY**
18 **REHABILITATION, LLC**

19 Hearing: January 31, 2020
Time: 10:00 a.m.
Place: 1300 Clay Street, Room 201
Oakland CA 94612
20 Judge: Hon. Roger L. Efremsky

21 **TO THE HONORABLE ROGER L. EFREMSKY, UNITED STATES CHIEF**
22 **BANKRUPTCY JUDGE, TRUSTEE, DEBTORS, AND ALL INTERESTED PARTIES:**

23 Stephen A. Finn ("Finn") and Winery Rehabilitation, LLC ("WR," and together with Finn,
24 the "Secured Creditors"), through their undersigned counsel, submit this response to the *Objection*
25 *to Claims* (the "Objection") filed by Andrea A. Wirum, chapter 11 trustee of the estate of the above
26 debtor (the "SVP Trustee") [Dkt. No. 52], and respectfully represent as follows:

1 **BACKGROUND**

2 **A. WR and Finn Proofs of Claim**

3 1. WR is the successor in interest to Silicon Valley Bank (“SVB”) with regard to two
4 loans made by SVB to both SVP and SVC pursuant to a Loan and Security Agreement dated May
5 17, 2012 (the “Loan Agreement”). These loans were secured by duly perfected first-priority liens
6 on and security interests in (i) all property of SVP, including equipment, machinery, inventory,
7 accounts, intangibles, intellectual property, (ii) the real property of SVP, and (iii) all replacements
8 and proceeds of the foregoing. Under the terms of the Loan Agreement, WR is entitled to
9 reimbursement of attorney’s fees and expenses in connection with claims asserted against WR
10 arising from or relating to the Loan Agreement. WR filed Claim No. 11-1 on April 10, 2017 (the
11 “WR Claim,” as amended) on account of the obligations arising under the Loan Agreement.

12 2. Finn, SVP, and SVC are parties to a Subordinated Secured Grid Promissory Note
13 dated May 17, 2012 (the “Grid Note”). The Grid Note was secured by a subordinated perfected
14 security interest in all right, title and interest of SVP and SVC in substantially all of their assets.
15 Under the terms of the Grid Note, Finn is entitled to reimbursement of attorney’s fees and expenses
16 in connection with claims asserted against him arising from or relating to the Grid Note. Finn filed
17 Claim No. 13-1 on April 10, 2017 (the “Finn Claim,” as amended, and together with the WR
18 Claim, the “Secured Creditors’ Claims”) on account of the obligations arising under the Loan
19 Agreement.

20 **B. Sale of the Winery and Allowance of Secured Creditors’ Claims**

21 3. On August 21, 2018, the Court ordered the appointment of a chapter 11 trustee. The
22 Office of the United States Trustee selected Timothy W. Hoffman (the “Original Trustee”), whose
23 appointment was approved by the Court on August 29, 2017 [SVC Dkt. No. 199]

24 4. Pursuant to this Court’s order dated December 11, 2017 [SVC Dkt. No. 249] (the
25 “Sale Order”), the Court approved the Original Trustee’s proposed sale of the collateral securing
26 the Secured Creditors’ Claims. Out of the sale proceeds, upon closing of the sale on or about
27 January 10, 2018 and pursuant to the Sale Order, the Original Trustee paid the Secured Creditors
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1 on January 11, 2018 on account of their claims including post-petition interest, fees, and expenses
2 known as of the payment date (the “Sale Proceeds Payment”).

3 **C. Claim Objection**

4 5. On May 22, 2018, Ross and Kelleen Sullivan (the “Sullivans”) filed a *First*
5 *Amended and Restated Objection to Claims 11 and 12 Filed By Winery Rehabilitation, LLC* [SVC
6 Dkt. No. 340] (the “Sullivan Claim Objection”), seeking to disallow the WR Claim. WR opposed
7 the Sullivan Claim Objection by, among other things, filing oppositions [see SVC Dkt. Nos. 350
8 and 352] and appearing at a hearing before the Court on June 20, 2018. At the hearing, the Court
9 declined to disallow the WR Claim, finding that it was an allowed claim as of January 10, 2018
10 and that although the amount asserted as of January 11, 2018 had been paid in full, WR had a
11 contingent claim for, at a minimum, attorney’s fees incurred in protecting WR’s interests. *See* Tr.
12 June 20, 2018 Hearing [SVC Dkt. No. 354]; *Order Regarding First Amended and Restated*
13 *Objections to Claims 11 and 12 Filed by Winery Rehabilitation, LLC* (the “Sullivan Claim
14 Objection Order”) [SVC Dkt. No. 368].

15 **D. Adversary Proceeding and District Court Action**

16 6. On July 14, 2017, while still the debtors-in-possession, the Sullivans commenced
17 an adversary proceeding in this Court (No. 17-01023 (the “Adversary Proceeding”)) against Mr.
18 Finn and Angelica de Vere, alleging estate causes of action and seeking general and special
19 damages and restitution and disgorgement of all money or property acquired in connection with,
20 among other things, the Loan Agreement.

21 7. On October 6, 2017, after being removed as debtors-in-possession and in their
22 capacity as equity holders of the Debtor, the Sullivans commenced a proceeding in the United
23 States District Court for the Northern District of California (Case No. 3:17-cv-05799 (the “District
24 Court Action”)) against Stephen A. Finn and Trust Company of America, in which the Sullivans
25 alleged purportedly individual causes of action seeking essentially the same relief as the Adversary
26 Proceeding. The District Court Action is ongoing, and the Sullivans continue to challenge the Grid
27 Note.

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11. On April 3, 2019, the Original Trustee filed his *Application for Order Authorizing Trustee to Enter into Compromise with Various Creditors and Litigants* (the “Compromise Motion”) [SVC Dkt. No. 422]. The Compromise Motion, in relevant part, states that the Secured Creditors’ Claims “will not be liquidated or otherwise resolved and settled as part of this compromise.” Compromise Motion, ¶ 17.

12. On May 20, 2019, the Court entered its *Order Authorizing Trustee to Enter Into Compromise Controversy with Various Creditors and Litigants* (the “Compromise Order”) [SVC Dkt. No. 435]. The Compromise Order, in relevant part, states “[c]onsistent with paragraph 2 of the Settlement Agreement, nothing in this order allows or disallows [the Secured Creditors’ Claims].” Compromise Order, ¶ 9.

ARGUMENT

A. Settlement Agreement Does Not Waive Secured Creditors Claims

a. The SVP Trustee’s Argument Ignores Mutual Intention of the Parties to the Settlement Agreement

13. In the Objection, the SVP Trustee asserts that the Secured Creditors waived their claims for attorney’s fees and expenses, with the exception of those fees incurred in the Adversary Proceeding. This argument ignores language of the Settlement Agreement, the Compromise Motion, and the Compromise Order (discussed above) which explicitly preserve the Secured Creditors’ right to pursue and recover on account of their allowed secured claims arising from the Loan Agreement and the Grid Note. Additionally, the SVP’s Trustee’s argument is inconsistent with the mutual intention and understanding of the parties to the Settlement Agreement at the time they entered into it.

14. The mutual intention of the parties can be seen in the language used by the representative of the SVP estate, the Original Trustee. In his *Notice of Trustee’s Intention to Compromise Controversy with Various Creditors and Litigants* (the “Compromise Notice”) [SVC Dkt. No. 408], after describing the Secured Creditors’ Claims for attorney’s fees and expenses, the Original Trustee stated that the Secured Creditors’ Claims “are not being liquidated or otherwise resolved and settled as part of this compromise.” Compromise Notice, Page 3, Lines 9-10. In his

1 status conference statement filed on May 13, 2019 (the “Status Conference Statement”) [SVC Dkt.
2 No. 433], the Original Trustee stated, “[i]n light of still pending litigation in the District Court
3 between Mr. Stephen Finn and Winery Rehabilitation, on the one hand, and the Sullivans, on the
4 other hand, it does not appear possible to liquidate the claims held by Mr. Finn and Winery
5 Rehabilitation until that litigation is resolved.” Status Conference Statement, Page 2, Lines 21-24.
6 And at the May 20, 2019 hearing on the Compromise Motion, the Original Trustee stated that the
7 Secured Creditors’ Claims “are not being liquidated.” Tr. May 20, 2019, page 3, lines 7-11.

8 15. This understanding that the parties did not intend to impact or impair the Secured
9 Creditors’ Claims is shared by the remaining parties to the Settlement Agreement, the Former
10 Employees. Counsel to the Former Employees understood the intention of the parties to the
11 Settlement Agreement to be that the compromise did not affect the Secured Creditors’ Claims at
12 all. *See* Declaration of Jonathan M. Cohen (the “Cohen Declaration”), ¶ 13. There was never any
13 intent or discussion, much less agreement, to waive or impair the Secured Creditors’ Claims. *See*
14 Cohen Declaration, ¶ 14.

15 16. To accept the SVP Trustee’s argument that the Secured Creditors’ Claims were
16 waived or otherwise disposed of by the Settlement Agreement would be to ignore the language of
17 the documents filed in connection with the Settlement Agreement and the mutual intention of the
18 parties. It would be inequitable to ignore the intent of the parties to the Settlement Agreement and
19 disallow the Secured Creditors’ Claims.

20 **b. Under California Law, the Settlement Agreement Should be Interpreted**
21 **to Preserve the Secured Creditors’ Claims for Attorney’s Fees**

22 17. The Settlement Agreement is governed by the laws of the State of California and
23 those laws are to be used in construing or interpreting the agreement. Settlement Agreement, ¶ 16.
24 Under California law, a settlement agreement is contract, and legal principles which apply to
25 contracts generally apply to settlement agreements. *In re Clawson*, 434 B.R. 556, 569 (N.D. Cal.
26 2010).

27 18. The Settlement Agreement “must be so interpreted as to give effect to the mutual
28 intention of the parties as it existed at the time of contracting, so far as the same is ascertainable

1 and lawful.” Cal. Civ. Code § 1636; *see Westport Ins. Corp. v. N. California Relief*, 76 F. Supp.
2 3d 869, 879 (N.D. Cal. 2014) (“California law establishes that the mutual intent of the parties at
3 the time a contract is formed governs interpretation”). The language used by the representative of
4 the SVP estate (the Original Trustee) and the sworn testimony of counsel to the Former Employees
5 shows that the mutual intention of the parties at the time the parties entered into the Settlement
6 Agreement was for the Secured Creditors’ Claims for attorney’s fees to be unaffected.

7 19. To the extent that the provisions of the Settlement Agreement are inconsistent—
8 *i.e.*, to the extent that the language in paragraph 2 of the Settlement Agreement is inconsistent with
9 the language in paragraph 6—the inconsistency should be reconciled by such an interpretation that
10 will give some effect to the inconsistent clauses, subordinate to the general intent and purpose of
11 the Settlement Agreement. Cal. Civ. Code § 1652; *see Estate of Petersen*, 28 Cal. App. 4th 1742,
12 1753-54 n.4 (1994) (“Contradictory or inconsistent provisions of a contract are to be reconciled
13 by interpreting the language in such a manner that will give effect to the entire contract.”); *see also*
14 Civ. Code § 1650 (“Particular clauses of a contract are subordinate to its general intent”).

15 20. As noted above, paragraph 2 of the Settlement Agreement states in relevant part,
16 “[n]either the Finn Party Claims nor the SVP Intercompany claim are being liquidated or otherwise
17 resolved by this Agreement.” Settlement Agreement, ¶ 2. The “Finn Party Claims,” as defined in
18 paragraph 2, mean the Secured Creditors’ Claims. In the wake of the Sale Proceeds Payment, the
19 Secured Creditors’ Claims are claims for attorney’s fees and expenses only.¹ Thus, the SVP
20 Trustee’s interpretation of the Settlement Agreement would leave the last two sentences of
21 paragraph 2 of the Settlement Agreement without meaning. On the other hand, paragraph 6 retains
22 meaning even if it is not construed to effect a waiver of the “Finn Party Claims,” because paragraph
23 6 extends to a broad range of attorney’s fees and costs that are not part of the Finn Party Claims,
24 such as those incurred in connection with the Napa County Action. To the extent of any
25 inconsistency, therefore, paragraph 2, as the more specific provision, should take precedence over

26 _____
27 ¹ The Secured Creditors reserve their rights to amend their claims to include additional attorney’s fees and expenses,
28 as well as any other amounts arising under the Loan Agreement, Grid Note, indemnity agreements, or section 503
of the Bankruptcy Code.

1 paragraph 6. *See* Cal. Code Civ. P. 1859 (“when a general and a particular provision are
2 inconsistent, the latter is paramount to the former”). The same result follows under the rule that,
3 “[w]here two clauses of an agreement are repugnant, the first shall be received and the latter
4 rejected.” *Hobson v. Mut. Ben. Health & Acc. Ass’n*, 99 Cal. App. 2d 330, 335 (1950) (quoting
5 *Burns v. Peters*, 5 Cal. 2d 619, 623 (1936) (internal quotation marks omitted). Accordingly, under
6 California law of contract interpretation, to the extent that the Court does not otherwise overrule
7 the SVP Trustee’s Objection to Claim, the Court should find that the Settlement Agreement did
8 not waive the Secured Creditors’ Claim for attorney’s fee and overrule the Objection to Claim.

9 **c. The SVP Trustee is Estopped from Arguing that the Secured Creditors**
10 **Waived their Claim to Attorney’s Fees.**

11 21. This case presents an unusual scenario where a second chapter 11 trustee has
12 stepped in as the representative of a debtor’s estate. Notwithstanding this change of
13 representatives, the SVP estate remains the party with which the Secured Creditors and Former
14 Employees entered into the Settlement Agreement.

15 22. As discussed above, the Original Trustee, who was the SVP estate representative at
16 the time of the Settlement Agreement, took the position on multiple occasions that the Secured
17 Creditors’ Claims for attorney’s fees were not being impacted by the Settlement Agreement. *See*
18 *e.g.* Compromise Notice, Page 3, Lines 9-10; Status Conference Statement, Page 2, Lines 21-24;
19 Tr. May 20, 2019, page 3, lines 7-11. Now, the SVP Trustee’s Objection asserts the opposite, that
20 the Secured Creditors waived a significant portion of their claims through the terms of the
21 Settlement Agreement. The SVP Trustee should be estopped from making this argument.

22 23. In the Ninth Circuit, judicial estoppel precludes a party from gaining an advantage
23 by taking one position, and then seeking a second advantage by taking an incompatible position.
24 *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir.1996). In determining
25 whether to apply the doctrine, a court should consider: “(1) whether a party’s later position is
26 ‘clearly inconsistent’ with its original position; (2) whether the party has successfully persuaded
27 the court of the earlier position; and (3) whether allowing the inconsistent position would allow
28 the party to ‘derive an unfair advantage or impose an unfair detriment on the opposing party.’” *In*

1 *re Hoopai*, 581 F.3d 1090, 1097 (9th Cir.2009) (quoting *New Hampshire v. Maine*, 532 U.S. 742,
2 750–51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)).

3 24. Here, the SVP Trustee’s position that the Settlement Agreement waived or resolved
4 the Secured Creditors’ Claims is clearly inconsistent with the Original Trustee’s position at the
5 time of the Settlement Agreement; the Original Trustee represented on multiple occasions in both
6 written filings and oral arguments before the Court that the Settlement Agreement did not resolve
7 or liquidate the Secured Creditors’ Claims; and allowing the SVP Trustee to take this new
8 inconsistent position on the interpretation of the Settlement Agreement would allow the SVP
9 Trustee both to derive an unfair advantage and to impose an unfair detriment on the Secured
10 Creditors. Accordingly, the SVP Trustee should be estopped from taking a position inconsistent
11 with the position that it represented previously to the Court.

12 **B. Secured Creditors are Entitled to Recover their Attorney’s Fees and Expenses**

13 25. The SVP Trustee’s argument in the Objection misunderstands the propositions for
14 which *Siegel*² stands and the basis for the Secured Creditors’ Claims.

15 **a. The Secured Creditors’ Claims are Allowed Secured Claims and a Final**
16 **Judgment for *Res Judicata* Purposes**

17 26. First, *Siegel* stands for the proposition that the deemed allowance of a proof of claim
18 is a final judgment for *res judicata* purposes. *Siegel*, 143 F.3d at 529. Accordingly, once the
19 Secured Creditors’ Claims were paid through the Sale Proceeds Payments, they were deemed to
20 be allowed and a final judgment for *res judicata* purposes. See Sullivan Claim Objection Order, ¶
21 2.

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28 ² *Siegel v. Fed. Home Loan Mortg. Corp.*, 143 F.3d 525, 529 (9th Cir. 1998)

1 **b. The Secured Creditors' Claims are Post-Petition Obligations**

2 27. Second, *Siegel* stands for the proposition that if a debtor decides to “return to the
3 fray” post-petition, the attorney’s fees incurred by a creditor in defending its claim are post-petition
4 obligations and not prepetition obligations. *Siegel*, 143 F.3d at 533.

5 28. Here, the Secured Creditors’ Claims were allowed on or about January 10, 2018.
6 The SVP debtor and the Sullivans had the ability to cease their attacks on the Secured Creditors’
7 Claims but continued to challenge those claims. As a result, the Secured Creditors were forced to
8 incur attorney’s fees and expenses to defend their already allowed secured claims. To the extent
9 that the Court determines these fees and expenses fall under *Siegel*, they are post-petition
10 obligations incurred by the SVP estate.

11 29. The SVP Trustee’s Objection seeks to distinguish between the actions taken by the
12 Original Trustee in the Adversary Proceeding and the Sullivans in their Claim Objection and
13 District Court Action. In doing so, the SVP Trustee is arguing that because the Sullivans had been
14 replaced by a chapter 11 trustee, their actions in bringing and prosecuting the Sullivans’ Claim
15 Objection and District Court Action do not constitute a “return to the fray” and the Secured
16 Creditors’ attorney’s fees and expenses incurred in defending their claim would not be post-
17 petition obligations against the SVP estate under *Siegel*. The Secured Creditors acknowledge that
18 the Sullivans were not the debtor-in-possession and had been replaced by the Original Trustee at
19 the time the Sullivans’ Claim Objection and the District Court Action were filed. However, the
20 Sullivans are the equity interest holders in not only SVP, but SVC as well. They were responsible
21 for filing the Adversary Proceeding during their tenure as debtor-in-possession and once they lost
22 control of that lawsuit after being replaced by the Original Trustee, they brought the District Court
23 Action seeking essentially the same relief as the Adversary Proceeding.

24 30. The chapter 11 case is unusual in that there will likely be sufficient funds to pay all
25 of the estates creditors and return value to the equity interest holders, the Sullivans. The Secured
26 Creditors believe that due to the special nature of the Sullivans’ interest in this case, they cannot
27 be considered in the same way as an out-of-the-money equity interest holder in a more typical case
28

1 might be. Here the Sullivans have continued to challenge the Secured Creditors' Claims in an
2 attempt to either enrich the SVP estate (to their ultimate benefit) or enrich themselves personally.
3 This constitutes a "return to the fray" and the attorney's fees and expenses incurred by the Secured
4 Creditors in response to this return properly implicate *Siegel* and should be found to be post-
5 petition obligations.

6 **c. The Secured Creditors' Claims are Oversecured and Any Portion**
7 **Determined to be Pre-Petition Claims are then Properly Included Under**
8 **Section 506(b)**

9 31. Third, the Secured Creditors' Claims are allowed secured claims subject to *res*
10 *judicata* and the only determination is whether the attorney's fees and expenses incurred
11 thereunder are secured claims under section 506(b) of the Bankruptcy Code or *Siegel* claims. To
12 the extent that this Court determines that *Siegel* does not apply to certain portions of the Secured
13 Creditors' Claims, those amounts should properly be included in the Secured Creditors' Claims as
14 secured claims under section 506(b) of the Bankruptcy Code.

15 32. Bankruptcy Code § 506(b) provides that the claim of an oversecured creditor "shall
16 be allowed ... interest ... and any reasonable fees, costs, or charges provided for under the
17 agreement or State statute under which such claim arose." 11 U.S.C. § 506(b).

18 33. Section 506(b) permits oversecured creditors to claim attorney's fees and costs:

19 To the extent that an allowed secured claim is secured by property the value
20 of which, after any recovery under subsection (c) of this section, is greater
21 than the amount of such claim, there shall be allowed to the holder of such
22 claim, interest on such claim, and any reasonable fees, costs, or charges
23 provided for under the agreement or State statute under which such claim
24 arose.

25 Thus, a creditor is entitled to postpetition attorney's fees and costs if: (1) the claim is an allowed
26 secured claim; (2) the creditor is oversecured; (3) the fees are reasonable; and (4) the fees are
27 provided for under the agreement. *Kord Enters. II v. Cal. Commercial Bank (In re Kord Enters.*
28 *II)*, 139 F.3d 684, 687 (9th Cir. 1998).

34. First, as discussed above, the Secured Creditor Claims are allowed secured claims
under *Siegel*. Second, the Secured Creditors are oversecured. Based on the Operating Report for

1 Filing Period Month Ended 12/31/2019 filed by the accountant for the SVP Trustee [Dkt. No. 69],
2 the SVP estate has a cash balance in excess of the Secured Creditors' Claims, even accounting for
3 administrative expenses and the Secured Creditors' agreement to subordinate their claims to the
4 SVP's trade debt. Third, the Secured Creditors reasonably incurred attorney's fees and costs in
5 defending their claims. Fourth, both the Term Loan Agreement and the Grid Note include
6 provisions that allow for the recovery of attorney's fees and expenses. Accordingly, to the extent
7 the Court determines that the Secured Creditors' Claims include amounts that not *Siegel* claims,
8 those amounts should be included in the Secured Creditors' Claims under section 506(b) of the
9 Bankruptcy Code.

10 CONCLUSION

11 WHEREFORE, Stephen A. Finn and Winery Rehabilitation, LLC respectfully request that
12 the Court overrule the Objection, and grant such other relief as the Court deems appropriate.

13 Dated: January 13, 2020

14 By /s/ Philip S. Warden
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